Labor and Employment Developments from around the World

ERIKA C. COLLINS*

I. Argentina

A. SUSPENSION OF DISMISSALS

The suspension of dismissals without cause was renewed and extended until December 31, 2003.[1] During the suspension period, employers must follow special procedures to dismiss employees without cause and employees are entitled to collect double severance. It is rumored that the government is planning another renewal and extension of the suspension period.

B. MANDATORY ALLOWANCE AND BASIC SALARY MANDATORY INCREASE

To reduce the impact of devaluation on employees' incomes, the government enacted regulations requiring a monthly, non-remunerative allowance (Allowance) that employers are required to pay in addition to the employees' remuneration.[2] The amount of the Allowance was: (1) AR$100 from July 1, 2002 until December 31, 2002;[3] (2) AR$130 from January 1, 2003 until February 28, 2003; and (3) AR$150 from March 1, 2003 until June

*Erika C. Collins is an Of Counsel in the Employment Law Department of Paul, Hastings, Janofsky & Walker LLP in New York, where she chairs the International Employment Law practice group. She wishes to thank the following contributors: Enrique Mariano Stile with Marval O'Farrell & Mairal (Argentina), Darren Gardner with MinterEllison LLP (Australia), Gavin Matthews with Blake Cassels & Graydon LLP (Canada), Lin Huawei, Deming Zhao and Li Zhang with Paul, Hastings, Janofsky & Walker LLP (China), Siobhra Rush with Matheson Ormsby Prentice (Ireland), Susanne Homén with Borenius & Kemppinen Ltd. (Finland), Vanessa Lehmann-Mensior with Bredon Rozec Lehmann (France), Dr. Alexander Lentz and Dr. Thomas Griebe with Taylor Wessing (Germany), Akil Hirani with Majmudar & Co. (India), Setsuko Ueno with Paul, Hastings, Janofsky and Walker LLP (Japan), Inge de Laat and Dirk Jan Rutgers with Kennedy Van der Laan (The Netherlands), Raffaella Betti Berutto with Gianni, Origoni, Grippo & Partners (Italy), Melissa Teo with Allen & Gledhill (Singapore), Dr. Martina Wittibschlager and Dr. André E. Lebrecht with Prager Dreifuss (Switzerland), Sophia H.H. Yeh with Lee and Li (Taiwan), and Ian Burton with Starr Legal LLP (United Kingdom).

1. Decree 256/2003 § 1.
2. The Global Employer (2003) at http://www.bakerinfo.com/ (last visited June 9, 2004).
3. Law No. 1273/2002, July 18, 2002, B.O. 18/07/2002.

30, 2003,[4] which was later increased to AR$200.[5] Special and reduced withholdings and contributions for the National Social Security System had to be paid on the Allowance.

The Allowance was not considered as a ratio or basis for the quantitative determination of any legal or contractual right or any right derived from a collective bargaining agreement.[6]

Since July 2003, the Allowance has been gradually included, on a staggered and progressive basis, in the basic salary, increasing basic salaries by AR$28 per month over an eight month period. Ultimately the full amount of AR$224 will be included in the employees' remuneration.

Including the Allowance in the employees' basic remuneration has the following consequences:

- The additional salary is subject to the corresponding withholdings and contributions to the social security system and must be included in the calculation of vacations, semiannual bonuses, severance payments, etc.
- The additional salary must be considered in calculating income tax.
- It impacts the severance ceiling.[7]

The government has announced that it will create a new, non-remunerable, allowance of AR$50, beginning in January 2004.[8]

C. Increase of the Minimum Wage

On July 1, 2003, the minimum wage was increased from AR$200 to AR$250 per month.[9] On August 1, 2003, the minimum wage was increased at a rate of AR$10 per month until ultimately the new minimum wage of AR$300 per month was reached on December 1, 2003.[10]

D. Amendments to the Retirement System

Employee contribution to the Integrated Pension System (SIJP) was 11 percent of his/her base salary.[11] In April 2002, this percentage was reduced to 5 percent, but a gradual increase to the former percentage was anticipated to be achieved in three steps: (1) an increase from 5 percent to 7 percent on March 1, 2003; (2) an increase from 7 percent to 9 percent on July 1, 2003; and (3) an increase from 9 percent to 11 percent on October 1, 2003.[12] In July 2003, however, the gradual increase of the contribution was suspended for one year. Thus, the percentage of the employee contribution will remain at 7 percent until July 2004, when it will increase to 9 percent and then to 11 percent in October 2004.[13]

4. Decree 1273/2002, § 1.
5. Law No. 905/03, Apr. 16, 2003, B.O. 16/04/2003.
6. Decree 2641/2002, § 1.
7. Decree 905/03, § 1.
8. Decree 2641, § 4; Resolution of the Labor Secretariat No. 158/2003, § 1.
9. Decree 1273/2002, § 6.
10. Law No. 388/03, July 15, 2003, B.O. 15/07/2003.
11. Decree 388/2003.
12. Law No. 2203/02, Oct. 30, 2002, B.O.
13. Law No. 390/03, Oct. 30, 2002, B.O.

E. Increase of the Minimum Pension

Beginning July 1, 2003, the minimum employer pension contribution was increased to AR$220 per month.[14]

II. Australia

A. Discrimination Law

The Sex Discrimination (Pregnancy and Work) Act 2003 was introduced to amend certain provisions of the Sex Discrimination Act 1984 (Cth) (SDA) in relation to discrimination on the grounds of pregnancy, potential pregnancy, and breastfeeding.[15] The amendments do not seek to expand the operation of the SDA, but rather to clarify, among other things, that discrimination against women who are breastfeeding is prohibited. The federal government has also introduced the Age Discrimination Bill 2003 to prohibit discrimination, including in employment, on the basis of age.[16] The prohibition already exists at a state level, however, at the federal level individuals with age based discrimination complaints do not currently have access to a binding remedy.

B. Victorian Workers

In 2003, the Victorian Parliament passed the Federal Awards (Uniform System) Act 2003 (FAUS Act) to refer additional state powers of labor and employment regulation to the federal Parliament.[17] The referral was designed to improve working conditions for Victorian employees not covered by federal awards and agreements[18] by allowing the federal Parliament to pass legislation permitting federal awards to apply as common rules on an industry-wide basis in Victoria.

After lengthy negotiations between the Victorian and federal governments, the federal Parliament passed the Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003, accepting the referral of powers under the FAUS Act and introducing a number of improved employment conditions for Victorian employees, including, for example, overtime, bereavement, and carers' leave.[19] It is anticipated that a test case before the Australian Industrial Relations Commission will establish how federal awards will apply as common rules across Victorian industries. Victoria is the only state to refer its powers of labor and employment regulation to the federal Parliament, establishing a unified system of labor relations in that state.

C. Case Law Developments

In December 2003, the High Court of Australia granted leave to appeal two controversial decisions of the Full Court of the Federal Court: *Gribbles Radiology Pty. Ltd. v. Health Services*

14. Law No. 391/03, July 15, 2003, B.O. 15/07/03.

15. Sex Discrimination Amendment (Pregnancy and Work) Act No. 103 (2003) (Austl.), *at* http://www.cpsu.org/au/news/files/28100300.pdf.

16. Age Discrimination Bill (2003) (Austl.), *at* http://www.ag.gov.au.www.

17. Federal Awards (Uniform System) Act No. 18/2003 (2003) (Austl.), *at* http://www.dms.dpc.vic.gov.au/sb/2003_Act/A01212.html.

18. Federal awards and agreements are quasi-statutes that establish minimum obligations and terms and conditions of employment for employers and employees.

19. Workplace Regulations Amendment (Improved Protection for Victorian Workers) Act, No. 8–2002–03 (2003) (Austl.), at http://www.aph.gov/au/library/pubs/bd/2002–03/03bd008.htm.

Union of Australia,[20] and *Amcor Ltd. v. Construction, Forestry, Mining and Energy Union*.[21] In *Gribbles*, the Full Court upheld a finding that a "transmission of business" had occurred between two companies despite there being no commercial transaction between the parties.[22] The decision expands the operation of "transmission of business" provisions under federal law. These operate to bind successors, assignees, or transmittees to or of a business (or part of a business) to federal awards and certified agreements that had bound the previous employer operating the business (or part of a business). In the *Amcor* case, the Full Court upheld a ruling that Amcor was required to make redundancy (severance) payments to approximately 800 employees deemed redundant despite these employees having accepted employment with a new employer on the same terms and conditions as those enjoyed with Amcor.[23] The High Court's response to these decisions will be watched closely in 2004.

Similarly, the Australian and Industrial Relations Commission's determinations on applications made in 2003 by a number of trade unions to review the TCR standard federal award clause on severance payments on redundancy will be of interest in 2004.[24] The applications, among other things, seek to increase the current maximum severance payment under the standard federal award clause from eight weeks' pay to sixteen weeks' pay.[25]

D. Return to Work After Maternity Leave

A number of decisions in 2003 highlight and confirm the fact that employers in Australia must carefully and objectively consider requests by employees for flexible work arrangements after a period of maternity leave. In *Mayer v Australian Nuclear Science and Technology Org.* (ANSTO) for example, ANSTO refused the employee's request to return to work part time after twelve months' maternity leave.[26] The Court held that there was sufficient evidence that the employee could have performed discrete project work part-time even if this was different from her previous job.

III. Canada

Many of the issues and concerns facing employers in Canada in the past year involve the development and evolution of privacy law. Federal undertakings have been governed by the federal Personal Information Protection and Electronic Documents Act (PIPEDA) for a couple of years. Following January 1, 2004, PIPEDA will apply more broadly to private sector organizations, including those industries carrying on business interprovincially or

20. Gribbles Radiology Pty. Ltd. v. Health Serv. Union of Austl. (2003) FCAFC 56, *available at* http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/56.rtf (last visited May 18, 2004).

21. Amcor Ltd. V. Constr., Forestry, Mining and Energy Union, (2003) FCAFC 57, *available at* http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/57.html.

22. Gribbles (2003) FCAFC 56.

23. Amcor (2003) FCAFC 57.

24. Termination, Change and Redundancy Case (1984) 8 IR 34.

25. At a state level, the Queensland Industrial Relations Commission has recently increased the standard severance entitlement on redundancy for award employees. Queensland Council of Unions and Queensland Chamber of Commerce and Industry Limited, *Industrial Organisation of Employers and Others*, 171(18) Queensl. Gov't Indus. Gaz. 1417 (2003).

26. Mayer v. Austl. Nuclear Sci. and Tech. Org., (2003) FMCA 209.

internationally.[27] PIPEDA allows the federal government to exempt from the application of the legislation the collection and disclosure of personal information that occurs entirely within a province that has legislation substantially similar to PIPEDA.

The Province of Quebec has legislation in place that has been declared "substantially similar" by the federal government.[28] The province is, therefore, exempt from the application of PIPEDA.

The Provinces of Alberta and British Columbia have also recently passed privacy legislation, though the federal government has not yet indicated whether such legislation is, in the federal government's view, substantially similar.[29]

In the face of uncertainty about what legislation will apply, and whether different activities of an organization may be subject to different privacy requirements, many businesses are struggling to adopt policies designed to meet the requirements of PIPEDA. In many organizations, human resource professionals are taking the lead in ensuring that their corporations are compliant with privacy requirements, including those related to the collection, use, and retention of employee information.

In these early days of the privacy legislation, one of the most useful sources of guidance with respect to the application of that legislation comes from the federal Privacy Commissioner.[30] Recent decisions related to the private information of employees are instructive for Canadian employers, and will be discussed below.

A. Use of Social Insurance Numbers

In decisions dealing both with employees and with clients of a company, the Privacy Commissioner has made clear that the practice of using an individual's Social Insurance Number (SIN) as a general identifier is inappropriate.[31]

Case No. 146, for example, dealt with an employer's practice of using the last four digits of an employee's SIN for identification purposes.[32] The Commissioner found that the employee had originally consented to the use of his SIN for income tax and Canada Pension Plan reporting purposes only, and that no consent had been obtained for the use of this information for another purpose.

Case No. 204 deals with an application for telephone service, rather than an employment situation.[33] The telecommunications company required a new applicant for service to provide information to enable a background credit check. The applicant had the option of providing any two of a driver's license number, a health card number, and a SIN, or providing a security deposit. Although the Commissioner found that the company had provided

27. Protection of Personal Information in the Private Sector (2000) (Can.), available at http://www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C-6/C-6_4/C-6_cover-E.html (last visited May 18, 2004).

28. *An Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q. c. P-39.1.

29. *Personal Information Protection Act*, S.A. 2003, c. P-6.5 and *Personal Information Protection Act*, S.B.C. 2003, c. 63.

30. Decisions of the Privacy Commissioner can be found *at* http://www.privcom.gc.ca (last visited May 18, 2004).

31. Privacy Commissioner of Canada, *Social Insurance Numbers* (2003), *at* http://www.privcom/gc.ca/fs-fi/02_05_d_02_e.asp.

32. Privacy Commissioner of Canada, *PIPED Act Case Summary #146* (2003) (Can.), *at* http://www.privcom.gc.ca/cf-dc/2003/cf-dc_030407_1_e.asp.

33. Privacy Commissioner of Canada, *PIPED Act Case Summary #204* (2003) (Can.), at http://www.privcom.gc.ca/cf-dc/2003/cf-dc03080502e.asp.

several options and was reasonable in its request for information to complete a credit check, the Commissioner "reiterated his view that Canadians should refrain from providing their SINs as identification. To do otherwise . . . would be to risk making the SIN a *de facto* national identifier, instead of simply an individual's account number for social benefit purposes."[34]

B. Special Requirements for Employee Medical Information

Several decisions of the Privacy Commissioner related specifically to employee medical information. Because of its particularly sensitive nature, it is clear that medical information must be dealt with carefully. Managers who might reasonably have access to other employee information may have no reason to see medical information. Employers are well advised to have clear policies in place and notify employees what information will be collected, how it will be used and by whom, how long information will be retained, and the consequences of failing to comply.

Cases No. 118 and *No. 119* highlight examples of policies and procedures that will satisfy the requirements of PIPEDA.[35] Both cases dealt with accusations that an employer was collecting medical information unnecessarily. The Commissioner found in each case that collecting the information was reasonable and limited to what was necessary. The investigation revealed that detailed information about the company's policy was available to all employees via its website and in a brochure. In addition, the procedures ensured confidentiality. The Commissioner also noted that the company's occupational health staff, doctors, and nurses who are bound by their respective codes of ethics, review the form and provide managers only with information relating to the abilities and limitations of the employee. Also, both cases kept computerized and non-computerized health information stored securely in a file separate from the other employee information.

Similarly, *Case No. 120* dealt with a company's policy on extended sick leave.[36] The policy requested that the employee sign a consent form authorizing his physician to disclose information related to the employee's illness directly to the employer's occupational health professionals. The Commissioner found that the company's purpose for collecting the information was legitimate and aligned with the principles of PIPEDA. The Commissioner was further satisfied that the company had the necessary policies and procedures in place to limit how, and by whom, the information was handled.

Case No. 191 dealt with an employee complaint that medical information she provided to her employer was then provided to the provincial Workers' Compensation Board (WCB).[37] The complainant also objected to the employer requirement that a medical report must be provided for all absences of more than three days, and that this medical report must provide a specific diagnosis and not merely a general description. The Commissioner found that the information was collected for a reasonable and legitimate purpose, that it

34. *Id.*

35. Privacy Commissioner of Canada, *PIPED Act Case Summary #118* and #119 (2003) (Can.) *at* http://www.privcom.gc.ca.

36. Privacy Commissioner of Canada, *PIPED Case Summary #120* (2003) (Can.), *at* http://www.privcom.gc.ca/cf-dc/2003/cf-dc0302173e.asp.

37. Privacy Commissioner of Canada, *PIPED Act Case Summary #191* (2003) (Can.), *at* http://www.privcom.gc.ca/cf-dc/2003/cf-dc_030711_1_e.asp.

was no more than required in the circumstances, and that the employer did appropriately identify its purposes to the employee. With respect to the disclosure to the WCB, the Commissioner found that this was a legal requirement under provincial legislation and therefore the disclosure was exempt from application of PIPEDA.

The Commissioner, however, also noted that in the course of the investigation, it was discovered that "even though the company's human resources staff was bound by a confidentiality agreement, the company did not otherwise have in place any policy, procedure, guideline, or staff training material specifically relating to the handling of employee information."[38] The Commissioner found that this was a contravention of Principle 4.1 of PIPEDA and recommended that the employer take steps to remedy this omission.

C. Forced Consent to Security Screening

Case No. 127 dealt with an employee whose employer required that he consent to a security clearance check before he could work in a restricted area at an airport.[39] The policy was implemented following terrorist attacks on the United States and the resultant increased security vigilance at airports. The complainant was informed that he would be dismissed if he failed to consent.

The Commissioner found that the employee had been informed when he commenced employment that a security check might be required and that failure to obtain clearance could result in termination. More interesting were the Commissioner's observations with respect to voluntary versus involuntary consent. The Commissioner held that, even though there were negative consequences associated with refusing consent—dismissal—the employee nonetheless had a real choice and gave consent. He further said that consent is often not unfettered and must be looked at in light of the reasonable person test. In these circumstances, it was reasonable for the company to collect the complainant's personal information, especially given the increased threat of terrorism.[40]

Case No. 185 dealt with two truck drivers who complained when a railway company asked that all drivers entering and exiting its terminal provide drivers' license numbers and fingerprints.[41] All drivers were notified of the railway's change in policy. Upon collection, drivers' license numbers were encrypted. Only approved railway personnel had access to the database that stores these numbers and the fingerprints. In addition, only a limited number of railway personnel had access to the locked cabinet where driver registration forms were kept. The Commissioner found the purpose for the measures reasonable for handling the large volume of trucks, minimizing liability for damage to railway containers, and reducing the potential for vandalism and acts of terrorism.

From a review of these few cases, it seems clear that many employers in Canada will need to change some common procedures and evaluate their compliance with privacy principles throughout their organizations, including in policies affecting employees. As the cases involving security screening highlight, there will be difficult questions related to consent

38. *Id.*

39. Privacy Commissioner of Canada, *PIPED Act Case Summary #127* (2003) (Can.), *at* http://www.privcom.gc.ca/cf-dc/2003/cf-dc030304_3_e.asp.

40. *Id.*

41. Privacy Commissioner of Canada, *PIPED Act Case Summary #185* (2003) (Can.), *at* http://www.privcom.gc.ca/cf-dc/2003/cf-dc_030512_2_e.asp.

where the needs of the employer or its clients conflict with the privacy expectations of the employees.

IV. China

2003 was a year of improvement for China's social security system.[42] Almost all of the central laws and local regulations discussed below constitute a large part of the social security system. Indeed, both the central laws and local regulations indicate the efforts made by the Communist Party of China to improve the social security system for the purpose of supporting further political and economic reform. Many of the governmental regulations promulgated were aimed at facilitating the re-employment and movement of professionals, tightening the control over the security and safety of labor, and establishing a healthy labor relationship, and the development of Chinese labor and employment regulations in 2003 reflects these goals.

A. Localization

Instead of regulating the issues of labor and employment at the central level, many provinces, autonomous regions, and centrally-governed municipal cities promulgated local regulations in accordance with the specific policy needs of their own regions.[43]

1. *Detailed*

The legislation, especially at the local level, provided details in many areas of labor and employment, including a minimum wage standard, basic old-age pension insurance for workers, and social medical insurance of workers.[44]

2. *Comprehensive*

The legislation evidences a broadened concern with issues of labor and employment, including full-time employment and part-time employment,[45] general issues such as labor security, training for employment, and re-employment.

B. Unemployment and Re-Employment

In 2003, the problem of unemployment became an obstacle to attaining social stability, which is one of the leading policies of the central government of China with respect to

42. *China's Social Security System Takes Shape*, People's Daily, Mar. 12, 2003, *at* http://english.peopledaily.com.cn/20030312_113185.shtml.

43. Labor Contract Ordinance of Jiangsu Province, Oct. 25, 2003; Administrative Provisions on Labor Contracts of Guangdong Province, May 13, 2003; Administrative Provisions on Labor Markets of Hebei Province, Sept. 26, 2003; Administrative Provisions on Labor Contracts of Fujian Province, Sept. 26, 2003; Labor Supervision Provisions of Shanxi Province, Sept. 28, 2003 (on file with author).

44. Regulations on Labor Safety of Jiangsu Province, Apr. 21, 2003. Other provincial regulations include Social Medical Insurance Procedures for Urban Staff and Workers of Shenzhen Municipal Government; Notification on Relevant Issues of Basic Medical Insurance of Beijing Bureau of Labor and Social Welfare, July 4, 2003 (on file with author).

45. *See e.g.*, *Several Issues Concerning the Administration of part-time Employment Circular*, issued by Beijing Municipal City on Apr. 23, 2003; *Several Issues Concerning part-time Employment Opinion*, issued by the Ministry of Labor and Social Security on May 30, 2003 (on file with author).

economic reforms. The following decrees were promulgated to reduce the effects of unemployment:

- *Supplementary Notification on the Preferential Tax Treatment and Other Policies with Respect to Furthering Reemployment*, issued jointly by the Ministry of Finance, the Ministry of Labor and Social Security and State Administration of Taxation on August 28, 2003;
- *Notification on Careful Handling of the Problem of Reemployment of Staffs of State-Owned Enterprises after They Leave the Reemployment Service Center*, jointly issued by the Ministry of Labor and Social Security and Ministry of Finance on September 25, 2003;
- *Notification on the Issue of Furthering the Training of Reemployment and of Setting up New Business*, issued by the Ministry of Labor and Social Security on June 13, 2003; and
- *Notification on the Standards of Implementing Reemployment Policies*, issued by the Ministry of Labor and Social Security on May 9, 2003.

The trend toward developing labor and employment regulations in China is indicative of the Chinese government's focus on stabilizing the society[46] and its willingness to increase its budget to solve the issue of unemployment that has arisen during the economic reform.

C. Labor Security and Safety: Central Government Level Reforms

Labor security and safety also continued to be a strong focus in the development of labor and employment law in China. The Ministry of Labor and Social Security issued the *Methods on the Verification of Work-Related Injury* and has also issued two ministerial decrees[47] addressing labor safety, as well as *Regulations on Insurance for Work-Related Injury* which was promulgated by the State Council on April 27, 2003.

The new decrees on labor safety cover the following subjects:

- detailed procedures for handling work-related injury cases;[48]
- measures to guarantee availability of medical treatment and economic compensation to staff and workers that suffer work-related accidental injury or occupational disease; to promote the prevention of work-related injury and occupational rehabilitation; and to distribute work-related injury risks.;[49]
- measures to support relatives of employees dying from work-related injury including coverage for: spouses, children, parents, paternal grandparents, maternal grandparents, and siblings;[50] and
- measures and standards for compensating the staff or any child laborer who suffers a work-related accidental injury or occupational disease.[51]

---

46. *See* Working Report of the State Council of P.R.C., adopted by the National People's Congress on Mar. 18, 2003 (on file with author). The Working Report emphasizes the importance of establishing a complete of social security system and also analyzes the relationship between social stabilization and economic development.

47. *Provisions on the Scope of Relatives to Be Supported of Employees Dying from Work-related Injury and Provisions on the Lump-sum Compensation by Units Illegally Employing Staff to Employees Injured or Deceased, Ministry of Labor and Social Security of the People*, (both issued on Sept. 23, 2003 and effective Jan. 1, 2004).

48. *See* art. 1 of *Methods on the Verification of Work-related Injury*, issued by the Ministry of Labor and Social Security on Sept. 23, 2003 and effective Jan. 1, 2004 (on file with author).

49. *See* art. 1 of *Regulations on Insurance for Work-related Injury*, promulgated by the State Council on Apr. 27, 2003 (on file with author).

50. *See* art. 1 of *Provisions on the Scope of Relatives to Be Supported from Employees Dying from Work-related Injury*, issued by the Ministry of Labor and Social Security on Sept. 23, 2003 and effective Jan. 1, 2004 (on file with author).

51. *See* art. 1 of *Provisions on the Lump-Sum Compensation by Units Illegally Employing Staff to the Employees Injured or Deceased*, issued by the Ministry of Labor and Social Welfare on Sept. 23, 2003 and effective Jan. 1, 2004 (on file with author).

D. Labor Security and Safety: Local Government Level

Based on the ministerial decrees promulgated by the Ministry of Labor and Social Security, many local governments in China also promulgated regulations aimed at tightening the control over work-related injury. In addition, the local governmental decrees go beyond what the central governmental laws call for, and cover many areas other than work-related injury, such as labor safety and labor sanitation.[52]

E. Labor Relationship

The Ministry of Labor and Social Security issued the *Directions on the Establishment of Communication System of Labor Relationship*, on August 18, 2002.[53] The regulation called for the provincial legislation on the procedures of communication among workers and the respective responsibilities of the communication system. As such, many provinces, including Jiangsu Province, Fujian Province, Guangdong Province, and Jiangxi Province, promulgated regulations or rules in 2003 to establish a communication system among workers, employers, and labor unions.

For example, the Jiangxi Province promulgated the *Opinions on the Establishment of Communication System of Labor Relationship in the Construction Industry within Jiangxi Province on* April 30, 2003.[54] The main objectives of the Jaingxi Provincial regulation state that the communication system should consist of the senior administrative department of the relevant industry, the labor union of the relevant industry, and the industry association of the relevant industry. The major responsibilities of the communication system include:

- analyzing the influence of economic reformation policies on labor contracts, minimum wage standards, work time, special protection of female workers, training, and social security;
- communicating with each other on important issues with regard to the labor relationship;
- providing suggestions during the investigation of disputes arising from the collective contract; and assistance with establishing the intermediation system within a single enterprise, to further the discussion system between workers and employers, and to perfect the system of labor contract and collective contract.[55]

V. Finland

As of April 1, 2003, the legal protection of corporate trade secrets with regard to former and current employees was strengthened as amendments to the Penal Code (39/1889) took effect.[56]

52. *See Regulations on Labor Safety*, adopted at the 2nd Session of the 10th National People's Congress Standing Committee of the Jiangsu Province on Apr. 21, 2003 (on file with author). Other provincial regulations include *Social Medical Insurance of Urban Staff and Workers Procedures*, issued by Shenzhen municipal government; *Notification on Relevant Issues of Basic Medical Insurance*, issued by Beijing Bureau of Labor and Social Security on July 4, 2003 (on file with author).

53. *Directions on the Establishment of Communication System of Labor Relationship*, Ministry of Labor and Social Security P.R.C., Aug. 18, 2002 (on file with author).

54. *Opinions on the Establishment of Communication System of Labor Relationship in the Construction Industry within Jiangxi Province*, Jiangxi Province P.R.C., Apr. 30, 2003 (on file with author).

55. *Id.*

56. Penal Code (2003) (Fin.), *available at* http://www.finlex.pdf.saadkaan/E8890039.PDF (last visited May 18, 2004).

The previous law stated that an unlawful disclosure or use of corporate trade secrets was a criminal act only during the employment relationship. When these provisions were first included in the Penal Code some ten years ago, the legislature wanted to ensure free movement of the labor pool and thus argued that the protection of trade secrets should terminate when the employment relationship terminated. With the new amendments, however, the legislature recognized changes in the labor market, as well as the fact that business operations are ever more dependent on intellectual assets and know-how.

Under the amended provisions, the non-disclosure obligation regarding corporate trade secrets survives a period of two years after the termination of the employment relationship.[57] Another significant improvement from an employer's viewpoint is the criminalization of any attempt to disclose trade secrets. Thus, in order for the criminal liability to arise it is no longer necessary that trade secrets actually be revealed.

A. Provisions of Penal Code as a Part of Trade Secrets Law

The Finnish law on corporate trade secrets is remarkably complex, both in general and in relation to employment relationships. Trade secrets are statutorily protected under three separate acts: the Penal Code, the Employment Contracts Act (55/2001),[58] and the Unfair Business Practices Act (1061/1978).[59] Each act, however, differs somewhat on issues such as (1) to whom they're applicable; (2) what exactly is considered to be a protected trade secret; and (3) whether the liability arising from a breach of those provisions is of a criminal or civil nature.

With regard to an employment relationship, these three acts overlap significantly, as all of them might be applicable depending on the particular circumstances. The primary source of protection, however, is the Penal Code, which covers almost all imaginable trade secret violations. The protection gained under the other acts ends, with some exceptions, at the moment an employment relationship is terminated. It is also important to note that the provisions of the Employment Contracts Act are applicable to employees only; whereas the other two acts also regulate non-standard employment-like relationships, such as independent contractor relationships.

Trade secret protection may be enhanced from the statutory level if the employer concluded non-disclosure agreements with employees. Under chapter 3, section 5 of the Employment Contracts Act, a non-disclosure agreement may be concluded with an employee only if there exists "a weighty reason particularly related to the operations of the employer in the employment relationship itself.[60] There is no time limit for how long the non-disclosure obligations may be agreed to be in force. Perpetual obligations might, however, be deemed unreasonable pursuant to section 36 of the Contracts Act and may thus be adjusted or set aside.

The Employment Contracts Act also constitutes a rather significant problem for employers, as it limits the amount of liquidated damages an employee might be liable for in

57. *Id.*

58. Employment Contracts Act (2001) (Fin.), *available at* http://www.finlex.fi/pdf/saadkaan/E0010055.PDF (last visited May 18, 2004).

59. Unfair Business Practices Act (2002) (Fin.), *available at* http://www.finlex.fi/pdf/saadkaan/E9781061.pdf (last visited May 18, 2004).

60. Employment Contracts Act, ch. 3 § 5.

the event he or she breaches the provisions of the non-disclosure agreement. According to the legislature, this fact, combined with the current market practice of using signing bonuses to attract new recruits, increased the need for criminal liability in this area.

B. Nature of Protection

According to chapter 30, section 11 of the Penal Code, the type of business information which may be protected as a trade secret, is that which a "businessman" keeps secret and the disclosure of which would cause "financial loss to him/her or to another businessman who has entrusted him/her with the information."[61] The code covers both the obtaining of information as well as the disclosure of information. In general, one may be found guilty of business espionage when one obtains company trade secrets without legal reason. When trade secrets are obtained with the consent of the owner thereof but are later unlawfully disclosed, the person perpetrating such an act may be found guilty of an act of violation of business secrets. The amended provision applies to action both during employment and for two years thereafter.[62] Violation against business secrets may, according to the Penal Code, lead to a fine or imprisonment for a maximum two years.[63]

Even though the business espionage provisions protect trade secrets primarily against outside parties, even an employee might be found guilty of the act if he or she was not entitled to obtain the information. An employee's rights and obligations with respect to trade secrets may be further delineated in an employment agreement or in a separate non-disclosure agreement. As no precedents exist, it is not clear whether a breach of such obligations might be regarded as business espionage.

C. Trade Secrets or Know-How?

The recent amendment of the Penal Code has increased the need to draw a line between an employee's know-how and an employer's trade secrets. The need is due to the two-year post-employment period, which only restricts the use of trade secrets by the former employee. The basic rule is that information in documented form is most often a trade secret, whereas the presumption is that memory-based information is considered an employee's "know-how." This general rule of thumb provides a starting point for scrutiny, but these issues must be considered on a case-by-case basis because the ability of such a general test to provide solutions for real-life situations is rather limited.

In addition, the extended protection period creates a risk for employers hiring new employees, as the employer might unintentionally, but unlawfully, use trade secrets belonging to the former employer. From the standpoint of the former employer, however, the risk that an employee would gather valuable trade secrets, resign, and start to compete with the employer, is reduced.

VI. France

The year 2003 started with the new government relaxing legislation involving the thirty-five hour work week and the redundancies (Statutes of 3rd and 17th January, *see* 2002 Annual

61. Penal Code, ch. 30 § 11.
62. *Id.* § 5.
63. *Id.*

Review). The three other reforms discussed below give an illustration of the variety of legal sources in France: statutes, case law, and national collective bargaining agreements. Further, a statute was passed on July 2, 2003, authorizing the government to directly simplify French complex employment law requirements such as headcount thresholds, redundancies deadlines, fixed-term contracts, records keeping, and the like.[64]

A. Statutory Reform on Pensions and Retirement

Anticipating the population's aging and forthcoming pension fund deficits, a much debated reform[65] was finally adopted on August 21, 2003. The law extends the length of contribution periods in order to guarantee a sufficient pension level. The main changes are as follows:

- By 2008, all employees will have to contribute for forty years in order to receive a full state retirement pension. This period will be raised to forty-one years by 2012.
- The minimum age for an employer to retire an employee to pension is raised from sixty to sixty-five.[66]
- A minimum pension is created (85 percent of the national minimum wage).
- Companies with early retirement schemes have to pay a special contribution to a national "Pensions Reserve Fund."
- Contributions to private pension funds are fostered.
- The exemptions of the 'Delalande Contribution' payment (a penalty for termination of employees over age fifty) are widened.[67]

B. Evolving Case Law on Dress Codes

In the famous, longstanding case of the Bermuda Shorts, the French *Cour de cassation* [Supreme Court] ruled that the freedom to dress is protected as a mere individual freedom, and not as a fundamental right. During hot weather in spring time, a male employee had been terminated for refusing to wear long pants under his prescribed professional white coat. The employee sued for reinstatement with the employer, claiming discrimination on a fundamental right.

The court not only held that he was not entitled to reinstatement, because the freedom was not deemed fundamental, but also that the employee was not entitled to any damages for unfair dismissal since the employer's dress request was deemed justified and proportional to his professional duties and working conditions.

On June 19, 2003, the Paris Court of Appeals confirmed the reinstatement of a woman dismissed for refusing to pull up her Islamic veil to the back of her neck while at work. The court's rationale was that the employee's appearance had not caused any trouble when previously put in contact with clients.[68]

---

64. Loi n 2003-591 habilitant le gouvernement à simplifier le droit [Statute enabling Government to simplify the law], July 2, 2003.

65. A similar reform had been given up after huge winter 1995 demonstrations and again Spring 2003 was marked by large and long strikes.

66. Subject to exceptions.

67. Loi n 2003-775 portant sur la réforme des retraites [Statute relating to Pensions reform], Aug. 21, 2003.

68. French President Jacques Chirac recently delivered an important speech regarding the much-debated question of the traditional *laicite* (secularity) of the country, calling for a renovation of the corresponding legislation. *See Chirac: Ban headscarves in schools*, Dec. 17, 2003, *available at* http://www.cnn.com/2003/WORLD/Europe/12/17/france.headscarves/ (last visited May 18, 2004).

C. Collective Bargaining: Lifetime Professional Training Right

On September 20, 2003, after almost three years of negotiations, national representatives of unions and employers completed a unanimous agreement providing for a right to training during all professional life. The main innovations are as follows:

- Creation of an individual right to professional training (twenty hours per year, up to 120 hours in six years).
- The mandatory 'Training Plan' of companies may now provide for specific training programs relating to employment evolution, skills development and adaptation to the work position.
- The increase of the employers' contributions rates to finance national professional training programs.[69]

VII. Germany

A. Significant Changes in the Law on the Protection Against Dismissal and Fixed-Term Contracts

Against the backdrop of the strained economic situation, substantial amendments were made to the, *Kündigungsschutzgesetz* (KSchG) (Termination of Employment Act) in 2003. Many of the revisions have been seen before. In 1996, the then Kohl government substantially revised this area of law in favor of employers. After the change of government in 1998, however, these changes were abolished after just two years, and the old legal position was restored. In December 2003, many of the 1996 alterations were revived and set to take effect on January 1, 2004.[70]

The first point of emphasis is that the minimum number of employees triggering the Termination of Employment Act for a business has increased from more than five employees to more than ten employees.[71] Nonetheless, employees who are protected under current law because they work for an employer with more than five employees will continue to enjoy protection even if only ten employees or less are employed in that business.

In addition, the legislature has finally limited the social selection criteria, which previously had not been described in detail.[72] The German regulations that protect employees against dismissal provide that, in the case of dismissals for operational reasons, an employer first must consider which employee to terminate based on various social criteria. The legislature has now restricted social selection in the case of dismissals for operational reasons to four criteria: (1) length of service; (2) age; (3) obligations to maintain others, such as whether the employee has children; and (4) an employee's severe disability, if any.[73] It remains doubtful however, whether the new regulation will make the legal position any clearer, since the law does not stipulate the relationship of these criteria to each other.

---

69. Accord national interprofessionnel de 20.09.2003 sur l'accès des salariés à la formation tout au long de la vie professionnelle [National Interprofessional Collective Bargaining Agreement of Sept. 20, 2003 relating to employees access to training all along their professional life].

70. The *Gesetz zu Reformen am Arbeitsmarkt* passed the Bundestag (German Parliament) on December 19, 2003. The revised final version of the KSchG has been published in Bundesgesetzblatt (Federal Law Gazette) I 2004, at 3002.

71. *See* § 23 Abs. 1 KSchG.

72. *Id.*

73. *See* § 1 Abs. 3 KSchG.

Moreover, the legislature has expressly stated that certain employees need not be considered in the selection process. Indeed, the amendment states that those employees whose continued employment is in the justified interest of the business because of their knowledge, skills, and performance, and those employees who need to be kept for the purpose of securing a balanced personnel structure in the business, do not have to be included in the social selection process.[74] Although this involves a certain degree of legal uncertainty, employers, as in 1996, may now exclude top performers from social selection and therefore take performance-based criteria into account. In the past, employers were required to consider social criteria on an almost exclusive basis.

For the first time, the Termination of Employment Act also provides a statutory claim to compensation for operation-related dismissals, something employers have long demanded to increase legal certainty.[75] Nevertheless, this change in the law only partially meets employer's demands. In the case of a dismissal for operational reasons, employees are only entitled to compensation if the employer—in connection with the notice of termination—also states that he bases the dismissal on urgent operating requirements. In such circumstances, an employee may claim compensation if the period for commencing legal action has passed. The compensation amounts to one-half of the monthly remuneration for each year in which the contract of employment existed. Since the employer is not obligated to make such an offer and the employee is not obliged to accept it, neither party may unilaterally force the other party into such an agreement. Accordingly, this provision serves only as a guideline.

In addition, the legislature considerably extended the scope of claims subject to the three-week period required for commencing legal action. In the past, an employee was required to bring an action in the labor court within three weeks following receipt of the notice of dismissal; otherwise, the dismissal was considered socially justified. The short period, however, applied only in the case of the social justification of the dismissal. Other grounds potentially invalidating the notice of termination such as maternity protection, violation of accepted moral standards, or a lack of consultation with the works council could still be claimed after the end of the three-week period. Given the extended scope of the statute of limitations, this is no longer the case.[76]

Finally, the legislature also strengthened the influence of collective agreements on the individual employee's position under legislation for protection against dismissal. According to the provisions of the *Betriebsverfassungsgesetz* (Industrial Constitution Act), employers now are required to negotiate first with the works council and to conclude a social plan in the case of changes in the business from a certain scale.[77] In the past, an agreement between the works council and an employer, under which certain employees were to lose their jobs because of changes in the business, had no effect on an employee's position under the Termination of Employment Act. An employee could still start legal action. The new law provides that the parties may add a list of employees affected by the measure to the agreement on the reconciliation of interests and social plan. If such a list exists, it is presumed by law that the social selection described above is correct.[78] The labor courts will review

74. *Id.*
75. *See* § 1a KSchG.
76. *See* § 4 KSchG.
77. *See* §§ 111–113 BetrVG.
78. *See* § 1 Abs. 5 KSchG.

the lawfulness of the dismissal in proceedings under individual law only with regard to gross incorrectness.

In addition to the changes in the law protecting employees against dismissal, the legislature also eased the law on fixed-term employment contracts. Under former German law, fixed-term employment contracts were required to meet a standard of objective reasonableness, and newly concluded employment contracts were excluded entirely. The old law allowed three possible extensions of a fixed term contract for a period of two years at the most. Now, the law grants more extensive rights for new businesses. Under the new law, during the first four years of a business, an employment contract may be limited to a fixed term of four years without an objective reason.[79] Furthermore, the amended laws contain significant restrictions with regard to *Arbeitslosengeld* (unemployment benefits). In particular, the period during which unemployment benefits may be drawn has been shortened, and the requirements regarding acceptance of a new job have been tightened considerably.

B. Changes in the Regulations on Temporary Employment

The law on temporary employment in Germany is marked by numerous restrictions and prohibitions compared to other European states. In particular, it provides that a temporary employee may be hired out for no longer than twenty-four months.[80] The German government now recognizes temporary employment as a job placement tool and intends to liberalize the current law.[81] The unions, which are generally critical of temporary employment, have ensured that the lifting of restrictions will not result in lost protections for hired out employees.

Against this background, a new regulation will come into force in the field of temporary employment on January 1, 2004. Temporary employment agencies will generally be under an obligation to grant the same main working conditions, such as equal pay and equal treatment, to the staff they hire out as are granted to the regular workers of the hiring firm.[82] For this purpose, the hiring firm is under an obligation to provide information about its main working conditions to both the temporary employment agency and the temporary employee.

The law does, however, permit a major exception to this principle. If a collective agreement is applicable to the employment contract between the temporary employee and the temporary employment agency, then the terms of the temporary employment contract are based on such collective agreement and there is no claim to equal pay/equal treatment with respect to the regular workers. The effective consequence is that it is necessary to conclude collective agreements to offer temporary employment at a reasonable cost, which is considered questionable to some extent under German constitutional law. In practice, most temporary employment agencies have applied such collective agreements in order to avoid expensive equal treatment. Therefore, the statutory principle will ultimately play almost no role in practice. The result is that the rules on temporary employment in Germany have been considerably liberalized; in particular, employees may now be hired out without any time limitation.

79. *See* § 14 Abs. 2a TzBfG.

80. *See* § 3 Abs. 1 Nr. 3–6 AÜG (repealed).

81. *See* Erstes Gesetz für moderne Dienstleistungen am Arbeitsmarkt published in Bundesgesetzblatt (Federal Law Gazette) I 2002 at 4607.

82. *See* §§ 3 Abs. 1 Nr. 3, 9 Nr. 2, 10 Abs. 4 AÜG (New Version).

VIII. India

A. Enforceability of Non-Compete Covenants

In August 2003, the Bombay High Court held that an employee who found better employment could not be restrained under a restrictive covenant in the contract of appointment.[83] In *Star India* the defendant tendered his resignation to the plaintiff company to join a competing company. The plaintiff argued that the resignation was void and asked the court to restrain the defendant from working with the competing company until the scheduled end of the employment contract in June of 2004.

The relevant clause in the contract prohibited the employee from directly or indirectly owning, managing, controlling, participating, consulting, or rendering services to any competitor once he had acquired knowledge about the trade secrets of the plaintiff. The court, however, held that not all information or general knowledge of facts about the company could be regarded as trade secrets or confidential information. Indeed, the court found that virtually every employee would obtain some information about his employer in the general course of his employment without any special efforts. Such general information did not, however, necessarily reach the level of being confidential or proprietary information. Moreover, the court held that an employer could not have proprietary rights in the skills acquired by an employee during the course of his employment, and it would not be in the public interest to restrict healthy competition.

B. Closure of an Industrial Undertaking

Section 25-O of the Industrial Disputes Act, 1947 (ID Act), requires an employer to obtain prior government approval before closing down a company or industrial undertaking.[84] In such cases, the Government conducts an investigation and examines if the reasons for closure are genuine and adequate. Section 25-O of the ID Act further requires that the public interest and all other relevant factors be taken into account. One such relevant factor would be the hardship caused to a large number of retrenched workmen. The Bombay High Court held that closing down operations in one place, and moving them to a region where taxes and production costs were lower could not be regarded as a genuine reason to close down an undertaking.[85] Further, the court considered the adequacy and genuineness of the reasons for closure, as well as other factors like the consequences for the displaced workmen and their families.

In *Voltas Employees Union*, the employer was originally based in the city of Thane and decided to set up new plants in other regions where taxes and production costs were lower. The Company then applied to the State Government for permission to close down the Thane plant, because the plant had surplus employees and it was no longer profitable. The Court held that enhancing profitability by moving to another region was not a justifiable

83. *See* Star India Pvt. Ltd. v. Laxmiraj Seetharam Nayak & Anr., 2003 Lab.I.C. 1618 (Bombay H.C.) (as cited in Bombay Chamber of Commerce & Industry, 2003 Digest of Labor Laws, Decisions & Allied Matters, 152–53).

84. Industrial Disputes Act of India, 1947, § 25-O, p.1, *available at* http://www.vakilno1.com/bareacts/industrialdisputesact/s25o.htm (last visited May 18, 2004).

85. Voltas Employee's Union, Mumbai v. Voltas Ltd, Mumbai & Anr., 2003 I.L.R., 205 (Bombay H.C.), *available at* http://www.manupatra.com (on file with author).

reason for the closure of the Thane plant, since the company had not demonstrated that it had become "totally impossible" to continue to run the establishment.[86]

C. Transfer of Undertakings

Section 25-FF of the ID Act entitles employees to certain benefits when the ownership or management of an undertaking is transferred to a new employer.[87] If transfer interrupts the employees' service or if the terms and conditions under the new employer are less favorable, then the employees are entitled to notice and compensation under Section 25-F of the ID Act as if they had been retrenched. The former owner, however, is not liable to retain the employees in service once the new owner offers them employment.

The Madras High Court recently held that a transfer of ownership was required to invoke Section 25-FF, and, where such transfer was absent, the statute could not be invoked.[88] The appellant company produced lifts and other items such as railway motors in its own manufacturing unit. It then entered into a collaboration agreement with another company for the purpose of manufacturing lifts at a new location. A new company was incorporated, which, in turn, built a new factory. Some workmen who had been employed by the appellant were asked to join the new factory. They refused and demanded to stay in service with the appellant. The appellant claimed that the establishment of the new factory amounted to a transfer of undertaking and argued that the offer of employment to the workmen by the new company was sufficient compliance with Section 25-FF of the ID Act, thereby imposing no liability on it to retain the employees in service.

The court rejected the appellant's claim and held it liable to retain the employees in service. There was no evidence that any part of the assets of the appellant relating to the lifts division had been taken over by the new company. No machinery had been moved from the appellant's factory to the new unit, and no payments were made by the appellant to the new company. Further, the manufacturing of lifts was not a distinct division of the appellant's establishment. Even though the company had ceased to manufacture lifts, it continued to produce several other items. No separate accounts were being maintained for the lift factory. The workmen did not work exclusively for the lift unit, but frequently manufactured the other items as well. Therefore, the court concluded that the new factory was not an undertaking transferred by the appellant. The term "industrial establishment or undertaking" as defined in section 2(ka) of the ID Act means an establishment or undertaking in which an industry is carried on.[89]

Moreover, it did not have to cover the entire industry or business of the employer, but any work, enterprise, project, or business undertaking.[90] None of these were transferred in the *Management of Best and Crompton* case, and, therefore, the employer was required to continue to employ the employees.

86. *Id.*

87. Industrial Disputes Act § 25-FF.

88. Mgmt. of Best & Crompton Eng'g Ltd., Madras v. Presiding Officer, First Additional Labor Court, Madras, & Ors., 2003 (2) L.L.N. 887 (Madras H.C.).

89. Industrial Disputes Act § 2(ka). *available at* http://www.vakilno1.com/bareacts/industrialdisputesact/s25o.htm (last visited May 18, 2004).

90. Workmen v. Straw Board, (1974) 4 S.C.C. 681, 694.

IX. Ireland

A. Development in Irish Employment Law in 2003

At present, employment law is one of the fastest developing areas of law in Ireland, and 2003 saw a continuation of the huge influence that European Union (EU) legislation has had on Irish employment law. A number of new acts were passed to implement various EU Directives and these are outlined below. Similarly, Ireland is one of the most advanced countries in Europe with respect to equality law, and decisions of the Equality Tribunal during the year demonstrate that the current legislation will be enforced against employers.

B. Legislation

Most of the new legislation passed this year relating to employment law was influenced by developments in the EU. The Protection of Employees (Fixed-Term Work) Act 2003 (2003 Act) came into operation on July 14, 2003, and implements Directive 1999/70/EC.[91] The objective of the 2003 Act is to provide for equal treatment of fixed term employees in the terms and conditions of employment when compared with a "comparable permanent employee."[92] Fixed-term employees can be treated less favorably than comparable permanent employees, if such treatment can be justified on objective grounds. Further, a less favorable term of employment may be objectively justifiable if, taken as a whole, the terms of a fixed- term employee's contract of employment are at least as favorable as those of a comparable permanent employee. The 2003 Act also aims to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

Irish law regarding employee's rights on the transfer of undertakings was amended by the European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003, which came into effect on April 11, 2003.[93] These Regulations replace those enacted in 1980, which implemented the original Acquired Rights Directive. The 2003 Regulations operate so as to transfer all the rights and obligations arising out of an employment relationship to a purchaser, upon the legal transfer of a business to that purchaser (other than by share purchase). The 2003 Regulations provide for compensation to employees of up to four weeks pay if the obligations to inform and consult with employees is breached, and up to two years pay for breaches of any other provisions of the Regulations. There are no longer provisions for prosecution by the Minister of Enterprise, Trade, and Employment for violations of the Regulations.

In anticipation of the accession of the new EU Member States (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, and Slovakia), the Employment Permits Act provides that nationals of these states will no longer be required to have work permits to take up employment in Ireland after May 2004.[94] This act makes provision for the imposition of fines of up to €250,000 or ten years imprisonment for employers who employ non-EU nationals without work permits.

91. Protection of Employees (Fixed-Term Work) Act (2003), *available at* http://www.gov.ie/bills28/bills/2003/2203/b22b03s.pdf (last visited May 18, 2004).

92. *Id.*

93. Directive 77/187/EEC as amended by Directive 98/50/EC, now replaced by Directive 2001/23/EC.

94. Employment Permits Act, 2003 S.I. 7, *available at* www.irlgov.ie (last visited June 12, 2004).

The Data Protection (Amendment) Act came into force on July 1, 2003.[95] This act gives effect to EU Directive 95/46/EC and serves to protect individuals with regard to the processing of personal data and the free movement of such data. This act introduced a number of new provisions, including extending the applicability of data protection rules to manual data (no longer just automated data). The Act also has implications for employers as to how they obtain, process, store, and disclose any personal data about their employees.

The Redundancy Payments Act increased the redundancy payment to be made to employees with more than 104 weeks continuous service, to two weeks of the employee's normal weekly remuneration for every year of service, plus a bonus week.[96] A week's normal weekly remuneration is capped at €507.90. The distinction between service under or over forty-one years of age has been abolished.

Two EC regulations, the European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003, came into operation on November 6, 2003 giving effect to Directive 2002/58/EC.[97] The act makes it illegal to send unsolicited direct-marketing emails and extends the confidentiality of electronic communications. The new provisions will impact an employer's right to monitor employee communications and further ensure the privacy rights of employees by requiring employers to obtain fully informed consent to the monitoring of any electronic communications networks.

C. Case-Law

A recent High Court case entitled *Morgan v. Trinity College Dublin* involved the suspension of a lecturer who claimed he hadn't been afforded natural justice.[98] The High Court distinguished between punitive suspension, where the employee is being disciplined, and a holding suspension, which takes place during an investigation. The Court held that the rules of natural justice must be followed in relation to the former, but not necessarily the latter, which had to be construed as permitting a suspension to continue only for the period of time during which it would be reasonably practicable to hold a full hearing into the matter.

The issue of fair procedures was further discussed in the case of *Cork Arts Job Initiative Ltd.v. A Worker*, which dealt with the issue of bullying and harassment in the workplace.[99] The employee had been on uncertified sick leave for a stress-related illness due to bullying and harassment at work. There was no policy or procedure in place to address the issue of bullying and harassment, and the employee was never interviewed regarding his complaint. He refuted the company's claim that the matter had been investigated and found to be groundless. The Labor Court held that while the company had investigated the matter internally, there should have been an investigation by an independent third party, which would have been reasonable under the circumstances. The case stresses the importance for employers to have adequate procedures in place to deal with claims by employees of bullying or harassment in the workplace.

95. Data Protection (Amendment) Act, 2003 S.I. 6, *available at* www.irlgov.ie (last visited June 12, 2004).

96. Redundancy Payments Act, 2003 S.I. 14, *available at* www.irlgov.ie (last visited June 12, 2004).

97. European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations, 2003 S.I. No. 535, *available at* www.irlgov.ie (last visited June 12, 2004).

98. Morgan v Trinity College Dublin (Ir. H. Ct. 2003) (on file with author).

99. Cork Arts Job Initiative Ltd. v. A Worker (2003) (on file with author).

D. Equality Law

In October 2003, the Director of Equality Investigations released figures for the first nine months of 2003, which revealed that individual claims relating to employment equality increased by 25 percent, compared to the same period in 2002.[100] Of those cases, half were gender-related. There is also a growing proportion of racial discrimination cases coming before the Tribunal, reflecting a greater awareness among the general public regarding equality rights and equality legislation. There was also an increase in the number of cases resolved through the mediation service provided by the Equality Tribunal.

In a Labor Court determination, entitled *A Health and Fitness Club v. A Worker*, an employee suffered from anorexia which developed into bulimia.[101] Her condition was held to fall within the definition of disability as defined under the Employment Equality Act.[102] The employee had been absent from work since March 2001 and, having received two verbal warnings, was dismissed on the basis that she was incapable of undertaking her duties. Under the 1998 Act, an employer is not required to employ an individual who is not competent to undertake his or her duties; however, the court held that to avail itself of this defense, an employer must make adequate inquiries to determine the employee's incapacity. Such actions would require:

- an examination of the nature and extent of an employee's disability and avail of appropriate medical advice; and
- the provision of any special treatment and/or facilities through which the employee may be made fully capable and competent to undertake his or her duties.[103]

Therefore, in all cases that deal with sick leave or related issues, an employer ought to ensure that an employee is afforded due process and proper procedures regarding both the diagnosis of his condition and any resulting entitlements.

X. Italy

After a lengthy and controversial negotiating process, a Legislative Decree (Decree) was issued on June 6, 2003, according to Law. No. 30 of February 14, 2003.[104] The Decree implemented the labor law reform as elaborated in the so-called White Paper of Professor Marco Biagi, which intended to increase labor market flexibility.

The above reform is very ambitious. It endeavors to create a labor market where labor supply and demand can meet more efficiently, and at the same time, introduces new flexible instruments to address structural unemployment problems. These new flexible elements include both traditional employment contracts, as well as new types of work contracts which better meet companies' needs.

This reform represents one of the most significant labor law reforms in the last thirty years and reflects Italy's effort to transition to a more balanced approach to employment-related issues.

100. ODEI—the Equality Tribunal, *at* www.odei.ie (last visited June 12, 2004).

101. A Health and Fitness Club v. A Worker (2003) (on file with author).

102. Employment Equality Act, 1998 S.I. 21.

103. *A Health and Fitness Club*; Relaxion Group plc v. Rhys-Harper [2002] EWCA Civ 304 The Industrial Cases Reports Express, *available at* http://www.lawreports.co.uk/ICREjulb1.3.htm (last visited June 12, 2004).

104. Legislative Decree, Law No. 30 (2003). *See Government presents White Paper on labour market, at* http://www.eiro.eurofound.eu.int/print/2001/10/feature/it110104f.html (last visited Feb. 27, 2004).

Listed below are some of the innovations introduced by the Decree, which applies only to the private sector.

A. Employment Agencies

The hiring of employees is prohibited unless conducted directly by an employer or through specific employment agencies responding to certain requirements as provided for by the Decree. The legislation introduced a new employment contract, the *contratto di sominstrazione di personale* (staff supply contract), which allows companies to engage employees through the employment agency provided that certain conditions are met. These conditions vary depending on the type of staff supply contract entered into by the company.

The staff supply contract can be entered into either on a fixed-term or indefinite term basis (collectively referred to as "staff supply contracts"). In particular, the indefinite term *contratto di staff leasing* (staff supply contract), is permitted only with respect to the activities specifically identified by the Decree, such as managerial consultant services, cleaning services, call-center management, information technology consultant services, as well as any other cases provided for by the collective bargaining agreement.

The fixed-term staff supply contract can be always entered into upon the occurrence of technical, production-related, organizational, or replacement reasons. The collective agreements set forth the limits to the amount of fixed-term supply contracts that can be entered into by a company and the terms and conditions of the renewals.

B. Independent Contractors with Continuous Contract and Occasional Contractors

With respect to an independent contractor with a *collaborazioni a progetto* (continuous contract), a written contract is required, providing, *inter alia*, for a specific project concerning the activities to be rendered. If there is no specific project, then the independent contractor will be deemed as an employee by operation of law from the beginning of the relationship.

On a different plan, an independent contractor will be qualified as a *collaborazione occasionale* (occasional consultant), provided that the term of the contract does not exceed thirty days per year and the relevant consulting fees collectively do not exceed €5,000.00. Under Italian law, no social security contributions are payable by the employer with respect to these types of independent contractors, as opposed to the case of independent contractors with continuous contracts.

C. Job Sharing Contract

The Job Sharing Contract allows companies to engage two employees to share one work position. Employees sharing jobs are jointly responsible for the supply of the work obligation and divide the salary in proportion to their respective working hours. The employer will comply with mandatory social security requirements accordingly. Collective agreements set forth the terms and conditions governing this type of contract.

D. Job on Call Contract

According to certain requirements specified in the collective agreements, or in their absence, in a specific decree to be issued by the Ministry of Labor, it is possible to enter

into a "Job on Call Contract" for working activity to be performed on a discontinuous or intermittent basis.[105] The job on call employee is entitled to a retribution and a stand-by allowance which is an allowance paid to the employee when he or she does not work, in exchange for the employee being on stand-by or on call.

E. Ancillary Work Contract

It is possible to enter into an "Ancillary Work Contract" for occasional working activities set forth in the Decree, such as minor domestic activities not exceeding thirty days per year and with total remuneration not exceeding €3,000.00).[106] Ancillary work contracts are generally performed by workers unemployed for more than one year, students, and retired people.

The ancillary worker is entitled, for each working hour, to receive from the employer a bonus of €7.5 purchased in authorized selling points. Employers may buy tickets with a value of €7.5 per working hour from any authorized selling point and then pay the employee on the basis of such ticket.[107]

F. Part-Time Work

The rules governing part-time work have been substantially modified, most notably with respect to extra hours and flexibility. Part-time work will be permitted in the agricultural sector and in relation to fixed-term employment. Part-time work will be regulated by collective agreements with a view towards simplifying and streamlining the currently applicable rules.

G. Training Employment Contracts

Contratti di apprendistato (apprenticeship contracts) shall consist of three different types: (1) apprenticeships fulfilling educational and training rights or duties; (2) apprenticeships aimed at the attainment of a professional qualification through training at work and technical or professional learning; or (3) apprenticeships for the acquisition of a diploma or for higher level training.[108]

The so-called "*Contratti di Formazione Lavoro*" shall no longer exist. These shall be replaced by *contratti di inserimento* (entrance contracts), such as contracts which are based on individual projects specifically aimed at adjusting the individual worker's skills to a working context. The parties benefiting from said contracts shall be young people between the ages of eighteen and twenty-nine years, disadvantaged workers, such as individuals who have been out of work for more than one year, and elderly workers.

XI. Japan

A. Japanese Labor Standard Law: The Abuse of Right Doctrine

On January 1, 2004, the Japanese Labor Standard Law (Labor Law)[109] was amended in order to codify the abuse of right doctrine set forth in a Japanese court precedent requiring

105. Legislative Decree no. 276 of Sept. 10, 2003.
106. *Id.*
107. *Id.*
108. *Id.*
109. *See* Yamamoto Immigration & Labor Consulting Office, *Working in Japan, at* http://www.yilco.jp/management-e.html (last visited May 18, 2004).

an employer to have reasonable grounds for terminating an employee.[110] Prior to the enactment of the amendment, no Japanese law, statute, or regulation prevented an employer from exercising termination at will by dismissing an employee without cause.[111]

Notwithstanding the lack of a relevant provision in the Labor Law, courts have firmly established the abuse of right doctrine, which requires an employer to have reasonable grounds for terminating an employee and protects employees from unilateral and/or unreasonable dismissals. The Labor Law was amended to codify the abuse of right doctrine because the lack of a relevant statute has made it difficult for employees to argue against unreasonable dismissals without obtaining legal assistance.

The original bill drafted by the Japanese government provided that an employer may dismiss an employee, unless the right of dismissal was limited by the Labor Law or provisions of other laws. A dismissal was invalid, however, by reason of abuse of rights if the employer lacked an objective and legitimate reason and the dismissal was thus considered unacceptable based upon social convention. Labor unions, bar associations, and opposition parties strongly opposed the original bill because employers retained an unfettered right to terminate employees without reason in principle, and the abuse of right doctrine was merely an afterthought. The parties opposing the original bill believed it would facilitate termination of employees. In light of such opposition, the amendment to article 18–2 was revised to become the main text. The text now reads as follows: "A dismissal shall be invalid by reason of abuse of rights if it lacks an objective and legitimate reason and thus is considered unacceptable based upon social convention."[112]

It is unclear what constitutes an "objective and legitimate reason" under the new article 18–2, but for years prior to its enactment, courts have routinely scrutinized terminations under the abuse of rights doctrine. For example, where an employer claimed an employee performed poorly, courts have required: (1) seriously poor performance by the employee; (2) warnings and an opportunity for the employee to cure such poor performance; and (3) efforts by the employer to avoid the dismissal, including transferring such employee to another department within the company. Another example relates to reductions in workforce. In such cases, courts regularly required the employer to show that: (1) the personnel reduction was necessary; (2) the company made reasonable efforts to avoid the termination of the employee; (3) the selection of the employees to be terminated was reasonable; and (4) the company conducted a good faith prior consultation with a union or the employees to be terminated.

110. *See* Japanese Institute for Labour Policy and Training *Revised Labor Standards Law acted, at* http:www.jil.go.jp/emm/vol.47/lsl_enact.htm (last visited May 18, 2004).

111. The Labor Law and relevant laws had the following restrictions for termination:

(1) during maternity leave or medical treatment for a work related injury or sickness and 30 days thereafter (the Labor Law, art. 19);
(2) by reason of an employee's nationality, creed or social status (the Labor Law, art. 3);
(3) by reason of employee's reporting to a labor inspection office a violation of the Labor Law (the Labor Law, art. 104);
(4) by reason of union membership or union activities (the Labor Union Law, art. 7);
(5) by reason of gender (the Equal Employment Opportunity Law, art. 8); and
(6) by reason of requesting or taking childcare leave or family care leave (the Childcare and Family Care Leave law, arts. 10, 16).

112. *See* News Release, Japan Federation of Bar Associations, Dismissal Rules to Be Enacted as Part of the Labor Standard Law (June 1, 2003), *available at* http://www.nichibenren.or.jp/en/activities/meetings/20030601.html.

The tendency of Japanese courts to require an employer to satisfy such onerous requirements is based on the Japanese tradition of life-long employment. As such, dismissal has been recognized as the equivalent of the death penalty for an employee. As a result of long term deflation and change in social structure change, however, Japanese courts gradually have begun to accept the validity of dismissal on lesser grounds. Japanese society is still very protective of employees, as indicated by the arguments surrounding the original bill. Thus, it will be imperative to continue to observe how Japanese courts apply the abuse of right doctrine in each case after the amendment becomes effective.

XII. Singapore

A. Introduction

Employment law in Singapore is governed by both common law and statute. The principal statute governing employment law in Singapore is the Employment Act.[113] The notable changes in 2003 are statutory in nature and are highlighted below.

B. Establishment of Singapore Workforce Development Agency

Effective September 1, 2003, a new statutory body called the Singapore Workforce Development Agency (Agency) was established pursuant to the Singapore Workforce Development Agency Act 2003.[114]

The Singapore Workforce Development Agency Act 2003 transfers to the Agency the functions, property, liabilities, and employees of the departments within the Human Capital Development Division and the Labor Market Development Division of the Ministry of Manpower, the Skills Development Fund Secretariat, the Critical Enabling Skills Training (CREST) Secretariat, and the National Skills Recognition System (NSRS) Centre of the Standards, Productivity, and Innovation Board.[115]

The functions and duties of the Agency include:

- serving as the national body in the areas of adult continuing education and training, the facilitation of employment and re-employment, and advising and making recommendations to the Government on matters, measures, and regulations connected with such areas (including the formulation of policies, and providing for infrastructure and facilities in relation to such areas);
- promoting, facilitating, and assisting in the development of adult continuing education and training so as to enhance the competitiveness and employability of the Singapore workforce;
- collaborating with industries and economic agencies to identify and promote the enhancement of industry-specific skills;
- promoting the development, competitiveness, and employability of the Singapore workforce through coordination with economic agencies; and

113. Employment Act, 1996 Ed. Cap. 91, *available at* http://statutes.agc.gov.sg/ (last visited May 18, 2004).

114. Singapore Workforce Development Agency Act 2003, No. 14 (2003), *available at* http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=2003-ACT-14-N&doctitle=SINGAPORE%20WORKFORCE%20DEVELOPMENT%20AGENCY%20ACT%202003%0a&date=latest&method=part (last visited May 18, 2004).

115. *Id.*

- supporting, facilitating, and assisting in the re-employment of unemployed or retrenched persons through job referral, retraining, upgrading of skills, and other employment facilitation efforts.[116]

C. Changes In Relation To Central Provident Fund Contributions

Effective October 1, 2003, the Central Provident Fund (CPF) contribution rate for workers aged fifty-five and below and whose monthly wages exceed SGD$750 were lowered from 36 percent to 33 percent.[117] The 33 percent will be borne by the employee and employer as follows:

Date	Total	Employee	Employer
October 1, 2003	33%	20%	13%[118]

These changes were first announced on August 28, 2003 by Prime Minister Goh Chok Tong in an effort to reduce business costs in Singapore.

Presently, CPF contributions are payable with respect to an employee's salary, subject to a maximum monthly salary of SGD$6,500. No CPF contribution is payable with respect to the employee's monthly salary in excess of SGD$6,500.

It has also been announced by Prime Minister Goh Chok Tong that changes in the CPF salary ceiling will be implemented as follows:

Current	SGD$6,000
January 1, 2004	SGD$5,500
January 1, 2005	SGD$5,000
January 1, 2006	SGD$4,500[119]

D. Employment Act

In its October 28, 2002 report, the Economic Review Committee Sub-Committee on Enhancing Capital (the Sub-Committee) recommended a review of the Employment Act to allow flexible working hours so that companies may arrange the working schedules to optimize use of their manpower resources.[120] The Sub-Committee noted that the Employment Act currently does not allow companies to implement annualized working hours and other similar work schedules. Hence, the Sub-Committee recommended that the Employment Act be amended to empower the Commissioner of Labor to exempt companies that intend to implement work schedules based on their needs. As yet, no review of the Employment Act pursuant to the recommendation of the Sub-Committee has taken place.

116. *Id.* § 11.

117. *See* Central Provident Fund Board, CPF Contribution Rate Booklet, Age Group 55 Years and Below From 1 October 2003, *available at* http://www.cpf.gov.sg/cpf_info/publication/conbooklet_arc2003.asp.

118. *Singapore overhauls social security system to stay competitive*, Agence France Presse, Aug. 28, 2003, *available at* http://www.singapore-window.org/sw03/030828af.htm.

119. *See* Central Provident Fund Board, *at* http://www.cpf.gov.sg/cpf_info/goto.asp?page=cpfchanges_menu.asp (last visited June 12, 2004).

120. *See* Econ. Rev. Comm. Sub-Comm. Final Report and Recommendations of the Economic Review Committee (Feb. 6, 2003), *available at* http://www.mti.gov.sg/public/ERC/frm_ERC_Default.asp?sid=119&cid=1486 (last visited May 25, 2004).

XIII. Switzerland

A. Federal Labor Law

On January 1, 2004, the Federal Statute on Professional Formation entered into force.[121] The Act regulates private and public law aspects of the professional formation and slightly modifies the Swiss Code of Obligations provisions on the contract of apprenticeship.[122] In particular, the employer must no longer personally perform the apprentice's formation. The employer's responsibility is to ensure that the apprenticeship is within the responsibility of a professional with the necessary professional and personal qualifications.[123]

B. Accompanying Legislation to the Bilateral Agreement on the Free Movement of Persons

The Bilateral Agreement on the Free Movement of Persons became effective on July 1, 2002 (Agreement).[124] The Agreement aims at granting the right to entry, residence, and access to employment as well as providing the same labor conditions for nationals of EU member states as for Swiss nationals. On June 1, 2004, the Act on Posted Employees and/or workers (*Entsendegesetz*) will enter into force.[125] The Act is modeled on the Directive of the European Parliament and of the Council of December 16, 1996, concerning the posting of workers in the framework of the provision of services.[126] It aims to avoid abusive wage-dumping that might otherwise arise as a consequence of the free access to the labor market. The Act stipulates minimal standards for labor conditions and wages for persons who are posted in Switzerland by an employer who resides, or has its corporate seat, in a country other than Switzerland.

Article 15 of the *Entsendegesetz* links the act to the Bilateral Agreement on the Free Movement of Persons with the EU.[127] Its field of application is, however, not limited to employees posted by employers in the EU. The Act also applies to employees who are posted by employers from non-EU countries. Nevertheless, such posted employees are subject to the provisions of the Regulation of October 6, 1986, which places limitations on the number of foreigners that may be posted.[128] The *Entsendegesetz* applies to employees who perform labor in Switzerland at an establishment, or to an undertaking owned by the employer's group of companies. The Act does not apply to the hiring out of a worker from a foreign country to a Swiss company, which is not permitted in Switzerland.

The provisions setting minimal standards of wages and terms and conditions of labor contracts can be found in Federal Statutes, Federal Regulations, general labor agreements which have been declared generally binding, and so-called normal labor agreements according to article 360a of the Swiss Code of Obligations.[129] Such provisions may concern

121. Federal Statute on Professional Formation, SR 412.10, AS 2003 4557.

122. *Cf.* Co art. 344 et seq. (SR 220).

123. *See* Revised Co art. 345(a).

124. Bilateral Agreement on the Free Movement of Persons, Apr. 30, 2002, Switz.-E.C., *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/1_114/1_11420020430en00060063.pdf.

125. Act on Posted Employees (*Entsendegesetz*), June 1, 2004.

126. Council Directive 96/71/EC, 1996 O.J. (L0071).

127. Act on Posted Employees, art. 15.

128. *See* SR 823.21.

129. *See* Act on Posted Employees, art. 3.

minimum wages, working hours and resting times, minimum vacation periods, work-security, health protection at work, protection of pregnant women, children and adolescents, and non-discrimination. According to article 3 of the *Entsendegesetz*, posted employees are entitled to accommodation which conforms to the usual standard of comfort and hygiene. In principle, such provisions must be adhered to from the first day of work in Switzerland. Exceptions to the provisions on wages and minimal vacations apply if there is only a small amount of labor to be performed in Switzerland, or if the labor concerns assembly or first installation and will take less than eight days.

Employers who will post employees will have to notify the competent cantonal authorities of any posting and submit information regarding the number and names of posted employees, the date upon which the labor will start, the kind of labor to be performed, and the place where the labor is to be performed. In addition, the employer will have to submit a declaration stating that he will comply with the Act. An employer who fails to comply with either the duty of notification or the duty to provide adequate accommodation may be fined up to an amount of CHF 5'000.00.[130] The fines are much higher if the employer knowingly provides incorrect information or refuses to provide information.[131] If an employer disregards the minimum standards regarding the issues mentioned above in a serious manner, such employer may be banned from offering his services in Switzerland for a period of one to five years.[132] An employer who denies these minimal standards to one employee systematically, repeatedly, and for the purpose of gain, is subject to fines to CHF1'000'000.00.[133]

C. Consequences of the Lapse of a Collective Labor Agreement

On October 2, 2003, the Swiss Federal Tribunal determined the consequences of the lapse of a collective labor agreement, which is not replaced by a subsequent collective labor agreement.[134] According to the Tribunal's decision, the provisions of a collective labor agreement that concerns the parties' respective obligations remain applicable between employer and employee within the framework of their individual labor agreement. Thus, if the parties have, at the time of concluding the employment contract, determined their respective obligations in light of the collective labor agreement in force at that time, then they have thereby incorporated the provisions of that collective labor agreement into the content of their individual employment agreement.[135]

D. Consequences of Transfer of Enterprise after Bankruptcy of Original Owner

Another decision by the Swiss Federal Tribunal concerned article 333 of the Swiss Code of Obligations.[136] Article 333, section 1, provides that, absent the employee's refusal, the legal relationship between the initial employer and employee is transferred to the acquirer,

130. *Id.* art. 9.
131. *Id.* art. 12.
132. *Id.* art. 9.
133. *Id.* art. 12.
134. *See* BGE 4C.74/2003.
135. *See* A. v. B., BGE 4C.74/2003.
136. *See* BGE 129 III 335 (Öffentliche Arbeitslosenkasse des Kantons Solothurn gegen Metallbau X. GmbH).

if an enterprise or part thereof is transferred to a third party.[137] Section 3 of the same provision states that the former employer and the acquirer are jointly and severally liable for employee claims that: (1) arose before the transfer; (2) arise at the time where the employment relationship could have been terminated by the former employer; or (3) arise at the time where the employment relationship has been terminated by the employees who refuses the transfer.[138]

In the past it was not clear (and therefore debated among scholars) whether article 333 also should apply in the case where an enterprise is transferred after the original owner of the enterprise has been declared bankrupt. On October 2, 2003, the Swiss Federal Tribunal had to determine whether the acquirer of an enterprise out of a bankrupt company's estate would be liable for an employee's claims that were ripe before the acquisition.[139] The Tribunal determined that article 333, section 1, is applicable to the acquisition of enterprises out of a bankrupt's estate.[140] The Swiss Federal Tribunal further held that the joint and several liability of the acquirer as provided by article 333, section 3, does not, however, apply if the acquisition was made out of a bankrupt's estate. The Tribunal reasoned that the initial purpose of the provision was to protect employees from the risk of insolvency of the *new* employer. The Swiss Federal Tribunal also reasoned that the acquirer's joint and several liability would deter potential acquirers and would therefore lead to the employees losing their employment. The Tribunal further held that such joint and several liability would lead to an unfair preferment of certain employees with respect to other creditors, including other employees whose legal relationship is not transferred. The Tribunal determined that the provision initially was enacted with a view to EEC-Law,[141] and that, according to the EC Directive in force today, the transferor of rights and obligations arising from an employment relationship "shall not apply to any transfer of an undertaking, business or part of an understaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings," unless Member State regulations provide otherwise.[142] In light of the fact that the Swiss legislator had not provided otherwise,

137. Co art. 333, § 1.

138. Co art. 333, § 3.

139. *See* BGE 129 III 335 (Öffentliche Arbeitslosenkasse des Kantons Solothurn gegen Metallbau X. GmbH).

140. According to an Opinion rendered by the Swiss Federal Department of Justice on October 12, 2001, article 333, section 1 does not apply if the transfer occurs within the framework of insolvency proceedings against the original owner, that the original owner and employer cannot freely decide to whom and at what price the enterprise or part thereof is sold, and provided that the proceedings are under the supervision of a public authority. *See* Gutachten des Bundesamts für Justiz VPB 66.8 (Oct. 12, 2001), *available at* http://www.vpb.admin.ch/deutsch/doc/66/66.8.html (last visited May 18, 2004).

141. EEC-Council Directive No. 187 of Feb. 14, 1977, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. *See* EEC Council Directive 77/187, 1977 O.J. (L024). The directive 77/187 did not contain any provisions with respect to the question of its application in the case of bankruptcy of the original owner. Since member-states were allowed to autonomously regulate the matter, different member-states resolved the issue in different ways. To overcome the resulting fragmentation, the EEC-Directive 77/187 was amended by EC Council Directive No. 50 of June 29, 1998, which was again replaced by Council Directive No. 23 of March 12, 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. *See* Council Directive 2001/23/EC, 2001 O.J. (L882), *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0023&model=guichett (last visited May 19, 2004).

142. *See* Council Directive 2001/23/EC art. 5.

the Swiss Federal Tribunal concluded that there is no joint and several liability of the acquirer who has acquired the enterprise out of a bankrupt's estate.

XIV. Taiwan

The Republic of China Protective Law for Mass Redundancy of Employees (PLMRE) was promulgated by the President on February 7, 2003 and took effect on May 7, 2003.[143] The PLMRE mainly prescribes redundancy procedures to be followed by business entities meeting the following thresholds:

- A factory in a business unit (such as a company) having less than thirty employees that intends to lay off over ten employees within sixty days;
- A factory in a business unit having more than thirty employees but less than 200 employees that intends to lay off over twenty employees within one day or over one-third of the total number of employees within sixty days;
- A factory in a business unit having 200 or more employees that intends to lay off over fifty employees within one day or over one-third of the total number of employees within sixty days; or
- A business unit having 500 or more employees that intends to lay off over one-fifth of the total number of employees within sixty days.[144]

Once the PLMRE becomes applicable, employers must comply with the procedures and requirements set forth under the PLMRE before making any employees redundant. The main provisions of the PLMRE include the following duties: (1) the employer must notify the labor union or labor representatives in advance and present a written redundancy plan; (2) the employer must consult with the labor union or labor representatives in good faith and must assist employees in finding re-employment; (3) the government has authority to prevent the company's responsible person from leaving the country if the company is behind in payment of wages, retirement fund contributions, or severance pay; and (4) the employer must provide financial statements and related information if the government authorities so request.[145] Violation of the PLMRE may subject employers to fines ranging from NT$30,000 to NT$500,000.

XV. The Netherlands

A. Corporate Governance Code

Due to the Enron and Ahold financial scandals, in the beginning of 2003 the Dutch government appointed a commission chaired by the former Managing Director of Unilever, Moris Tabaksblat, to develop a Corporate Governance Code.[146] On July 1, 2003, the Commission Tabaksblat published a draft Corporate Governance Code.[147] Amongst other pro-

143. Protective Law for Mass Redundancy of Employees (Feb. 7, 2003).

144. *Id.*

145. *Id.* § 4.

146. Press Release, European Corporate Governance Institution, Draft Code of Tabaksblat Committee Strengthens Position of Shareholders and Supervisory Directors (July 1, 2003), *available at* http://www.ecgi.org/codes/country_pages/codes_netherlands.htm.

147. Corporate Governance Committee, The Dutch Corporate Governance Code:

Principles of Good Corporate Governance and Best Practice Provisions: Draft: An Invitation to Comment (July 1, 2003), *available at* http://www. ecgi. org/codes_country_pages/codes_netherands.htm.

posed changes, the Commission suggested radically changing the position of the managing director under the articles of association. The Commission's opinion is that the bonuses of managing directors should not be higher than one-half of the total yearly salary of the managing director and that departing managing directors should only be entitled to a maximum of one year's salary as termination compensation. Under pressure from the Dutch organization of employers, however, the Commission has withdrawn the aforementioned suggestions. In the final Code, published on December 9, 2003,[148] the bonuses of the managing directors are not limited and the maximum termination compensation has been stretched to a maximum of two years' salary. By order of the Commission, the code is to become the code of conduct to which listed companies must refer and for which the "apply or explain" rule applies. The Dutch government will also review the fifteen legislative recommendations as quickly as possible. It is more than likely that this Code will highly influence the employment conditions of managing directors of listed companies in the future. As the Code represents present business values, it will also likely influence managing directors of companies that are not listed.

B. Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EC-44/2001)

Although the regulation came into force on March 1, 2002, the ensuing changes have predominantly come into force in 2003.[149] Based on this regulation, an employer may bring proceedings only in the Courts of the Member State where the employee is domiciled. When related actions are pending in courts of different Member States, any court other than the court in which the parties first appear may stay its proceedings. In 2002, an employee who worked in the Netherlands but lived in Belgium was subpoenaed before a Belgian court.[150] The Belgian court was indeed competent because the employee was domiciled in Belgium; however, the court had to apply Dutch law. In doing so, the Belgian labor law court rescinded the employment agreement and determined the compensation for the employee.

C. Amendment Dismissal Decree

In 2002, the media in the Netherlands was very focused on the CMG ruling.[151] CMG is a company focused on IT services which merged in 2002 with another company named Logica. When CMG needed to reduce its workforce, it applied the Dutch rules for dismissal of temporary workers in order to determine who was eligible for dismissal. CMG was of the view that the agreement it had with its consultants met the description of a temporary work agreement as set forth in the Dutch Civil Code. The trade unions protested, believing that CMG and its consultants were bound by regular employment agreements since the consultants were not being seconded. In addition, the trade unions argued that the

148. Corporate Governance Committee, The Dutch Corporate Governance Code: Principles of Good Corporate Governance and Best Practice Provisions (Dec. 9, 2003), *available at* http://www.ecgi.org/codes_country_pages/codes_netherands.htm.

149. Corrigendum to Council Regulation 44/2001, 2001 O.J. (L 12).

150. Arbeidsrechtbank Tongeren, Belgium, 27–07–2002, 1335/2002 (JAR 2002/199).

151. European Industrial Relations Observatory On-line, *Controversial Ruling on Dismissals*, *at* http://www.eiro.eurofound.eu.int/2002/09/inbrief/nl0209101n.html (last visited May 18, 2004).

employment agreements of the employees failed to state—as prescribed by law—that the consultants had temporary employment agreements. Both the District Court and the Court of Appeal in The Hague stated that the triangular relationship at issue between CMG and its consultants could be regarded as a temporary employment agreement as used in the Dutch Civil Code. Since CMG had also proven during the proceedings that an important part of its activities consisted of seconding the consultants, the Court of Appeal held that the rules for dismissal applicable to temporary workers were indeed applicable to the consultants of CMG.

The commotion following the CMG ruling prompted the Minister of Social Affairs and Employment to amend the Dismissal Decree on March 10, 2003, so as to prevent employers like CMG from using the exceptions to the principle of seniority that are applicable to the temporary work sector. An exception is permissible; however, if an employer can prove that an employee who was seconded to a third party is of great importance to that third party. In such a case, it is possible to not consider such for an employee to be when the seniority is assessed.

Consequently, employers who engage in the seconding of employees and want to implement job cuts must simply apply the principle of last- in, first- out to the entire company and all their seconded employees, unless they are able to prove that certain employees seconded to third parties are of crucial importance.

XVI. United Kingdom

A. Anti-Discrimination Legislation

The year 2003 has seen considerable developments in new legislation with respect to discrimination in the workplace.

1. *Race Discrimination*

The Race Relations Act 1976 (Amendment) Regulations 2003 (the Regulations) came into force on July 19, 2003.[152] The Regulations introduced a number of significant changes, including a new definition of indirect discrimination. The new wording provides for indirect discrimination where a provision, criterion or practice puts persons of the same race or ethnic or national origin at a particular disadvantage when compared with others, and which cannot be shown to be a proportionate means of achieving a legitimate aim. Thus, courts no longer have to undertake a complex analysis to work out whether a smaller proportion of a particular racial group can comply with a condition or requirement, as was the case under the old definition of indirect discrimination.

The Regulations also introduce, for the first time, a statutory definition of post-termination discrimination. This accords with the recent decisions of *Relaxion Group plc v. Rhys-Harper*;[153] *D'Souza v. London Borough of Lambeth*;[154] and *Jones v. 3M Healthcare*,[155] in

152. Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, *available at* http://www.legislation.hmso.gov.uk/si/si2003/20031626.htm (last visited May 18, 2004).

153. *Relaxion Group plc v. Rhys-Harper* 2003 UKHL 33, 2003 ICR 867.

154. *D'Souza v. London Borough of Lambeth* 2003 UKHL 33, 2003 ICR 867.

155. *Jones v. 3M Healthcare* 2003 UKHL 33, 2003 ICR 867.

which the House of Lords confirmed that post-termination discrimination by an employer was unlawful under the race, sex, and disability discrimination laws.[156]

The definition of harassment also has been revised, and there is a new defense of genuine occupational requirement, where employers show that a particular characteristic—for example, racial group—is necessary for a job. In practice, however, this defense will rarely be available.

2. *Sex Discrimination and Equal Pay*

The Sex Discrimination Act 1975 (Amendment) Regulations 2003 also came into force on July 19, 2003.[157] The principal change to the existing legislation is the introduction of protection against post-termination discrimination on grounds of sex, similar to the race regulations described above.

On April 6, 2003, the Equal Pay (Questions and Replies) Order 2003 came into force, introducing equal pay questionnaires into the U.K. legal framework.[158] The process is similar to those already in place for sex, race, and disability questionnaires. The questionnaires allow individuals who believe they have not received equal pay to question their employer as to whether there is any differential in pay and, if so, why. If an employer does not respond, either adequately or at all, the sanction is the same as that for sex, race, and disability questionnaires: a court may draw certain inferences in subsequent litigation.

The previous limit of two years' back pay as compensation in equal pay cases was removed by the Equal Pay Act 1970 (Amendment) Regulations 2003,[159] which came into force on July 19, 2003. Pay arrears will now typically be recoverable for up to six years before the date on which legal proceedings are commenced.

3. *Disability Discrimination*

In accordance with the Disability Discrimination (Blind and Partially Sighted People) Regulations 2003, effective April 14, 2003, any person who is blind or partially sighted is now deemed disabled within the meaning of the Disability Discrimination Act 1995 (DDA).[160]

On October 1, 2003, the Disability Discrimination Act 1995 (Amendment) Regulations 2003 came into force.[161] Most notably, these regulations amend the DDA definition of disability discrimination by now making it unlawful to treat a disabled person less favourably if he or she is able to do the job. Albeit unlikely in practice, previously, it was possible to justify direct discrimination under the DDA. Now, discrimination is justifiable only where the disabled person is unable to do the job even with a "reasonable adjustment." Additionally, there is no longer an exemption for DDA employers with fewer than fifteen employees.

156. The Industrial Cases Reports Express, *Discrimination*, *available at* http://www.lawreports.co.uk/ICREjunc0.9htm (last visited Feb. 12, 2004).

157. Sex Discrimination Act 1975 (Amendment) Regulations 2003, SI 2003/1657, *available at* http://www.legislation.hmso.gov.uk/si/si2003/20031657.htm.

158. Equal Pay (Questions and Replies) Order 2003, SI 2003/722, *available at* http://www.legislation.hmso.gov.uk.si/si2003/2003722.htm.

159. Equal Pay Act 1970 (Amendment) Regulations 2003, SI 2003/1656, *available at* http://www.legislation.hmso.gov.uk.si/si20031656.htm.

160. Disability Discrimination (Blind and Partially Sighted Persons) Regulations 2003, IS 2003/712, *available at* http://www.legislation.hmso.gov.uk/si/si2003712.htm.

161. Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673, *available at* http://www.legislation.hmso.gov.uk/si/si20031673.htm.

4. *Religious Discrimination*

On December 2, 2003, discrimination on grounds of religion or belief was made unlawful in the U.K. pursuant to the Employment Equality (Religion or Belief) Regulations 2003.[162] The new protection covers religion, religious belief or similar philosophical belief. Religion is not otherwise defined in the Act, and the extent to which minority religions or unusual philosophical beliefs will be protected remains unclear. The new law is also unclear regarding whether it has any application to atheists. It is expected that this gray area will generate much case law over the coming years.

The protection from religious discrimination covers direct and indirect discrimination, harassment, and victimization. Post-employment termination discrimination is also covered. In essence, the new protection for religion and belief works in much the same way as the existing anti-discrimination laws for sex, race, and disability.

Procedures for enforcement are also essentially the same as those for the existing anti-discrimination laws for sex, race, and disability. Accordingly, complaints must be presented within three months of the date of discrimination; there is no length-of-service requirement, the protection applies from the outset of the employment relationship; questionnaires may be used; and a court may award unlimited compensation where discrimination is found.

5. *Sexual Orientation*

On December 1, 2003, discrimination on the grounds of sexual orientation was made unlawful in the U.K. pursuant to the Employment Equality (Sexual Orientation) Regulations 2003.[163] The additional protection covers discrimination on grounds of orientation towards persons of the same sex (homosexuals), the opposite sex (heterosexuals), and the same and opposite sex (bisexuals).

An express exception from this regulation's scope is made for employee benefits dependent on marital status. It will not be indirect discrimination to offer benefits to married workers and their spouses, even though this may put homosexual employees at a disadvantage because they cannot get married. It should be noted, however, that if (as is often the case) benefits are provided to an employee and his or her unmarried partner of the opposite sex, it will be unlawful not to offer the same benefits to an employee whose partner is same-sex.

These new regulations operate in much the same way as the new religious discrimination rules, and thus, much like the existing laws prohibiting race, sex, and disability discrimination. The Regulations prohibit direct and indirect discrimination, harassment, victimization, and post-termination discrimination. Likewise, enforcement is the same as that under the religious discrimination regulations.

B. Health and Safety at Work

On October 27, 2003, the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 came into force.[164] The Regulations

162. Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, http://www.legislation.hmso.gov.uk/si/si20031660.htm.

163. Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, *available at* http://www.legislation.hmso.gov.uk/si/si20031661.htm.

164. Management of Health and Safety at Work and Fire Precautions (Workplace)(Amendment) Regulations of 2003, SI 2003/2457, *available at* http://www.legislation.hmso.gov.uk/si/si20032457.htm.

provide that employees may now bring civil claims against their employers if they are in breach of duties imposed by the Management of Health and Safety at Work Regulations 1999. The latter set of regulations specifies how employers must comply with their various duties as laid out under general health, safety, and work legislation. They cover requirements such as the need to carry out risk assessments, set up emergency procedures, provide training, and implement protective measures.